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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/649,747

08/28/2003

Cynthia L. Ebner

D-43641-01

5716

7590  
Howard Troffkin  
7808 Ivey Mount Terrace  
Potomac, MD 20854

06/15/2009

EXAMINER

HAIDER, SAIRA BANO

ART UNIT

PAPER NUMBER

1796

MAIL DATE

DELIVERY MODE

06/15/2009

PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<p align="center"><b>Advisory Action</b> <b>Before the Filing of an Appeal Brief</b></p>	<b>Application No.</b> 10/649,747	<b>Applicant(s)</b> EBNER ET AL.	
	<b>Examiner</b> SAIRA HAIDER	<b>Art Unit</b> 1796	

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 18 May 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

#### AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 1-5, 7-13, 15 and 16.  
Claim(s) withdrawn from consideration: 6, 14 and 17-28.

#### AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

#### REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information *Disclosure Statement*(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☐ Other: \_\_\_\_\_.

/James J. Seidleck/  
Supervisory Patent Examiner, Art Unit 1796

Continuation of 11. does NOT place the application in condition for allowance because: The examiner maintains the positions set forth in the Final Office Action. Applicant's have amended the claims to reiterate that PA and PB are prepolymers block segments. The amendment is not considered to change the scope of the claims and thus has been entered.

Applicants have argued that the Ito reference is drawn to a mixture of polyester polymers with polyester block copolymers, whereas the claims are drawn to a block copolymer. As previously noted in the Final Office Action (paragraph 7), the claims do not exclude a mixture of polymers, attention is directed to section 2111.03 of MPEP. The prior art teaches a block copolymer comprising the two segments, which read on the claimed PA and PB prepolymers. The presence of the mixture in the Ito reference is not excluded from the claims.

Applicants' remaining arguments are essentially the same as previously presented, therefore the examiner directs attention to the Final Office Action. Specifically, since the prior art composition is the same as the claimed composition, it is clear that the prior art composition possess the claimed oxygen scavenging properties.

Applicants have not claimed that the claimed layer must be exposed to the container inner atmosphere, thus the layer taught by the combination of references meets the claims.

Applicants have argued the presence of unexpected results, citing Examples 21-40. The examiner has considered such examples and concludes that the statements and examples merely amount to an affirmation that the claimed subject matter functions as it was intended to function. Example 21 as compared to Example A2 merely shows that the inclusion of the polycaprolactone block resulted in improved properties, however this was not the basis of the rejection. As per MPEP § 716.01(d), in making a final determination of patentability, evidence supporting patentability must be weighed against evidence supporting prima facie case. Examples 23-40 are not commensurate in scope with the claim, as required, because the examples do not include the elected species of the polycaprolactone block. Accordingly, the examiner maintains the positions set forth in the Final Office Action.

The examiner erroneously checked box 7(a) on PTOL-303 (Advisory Action) mailed on 6/10/2009. This advisory action correctly checks box 7(b) to indicate that the proposed amendments will be entered.